

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

HARVEY G. OTTOVICH REVOCABLE
LIVING TRUST DATED MAY 12, 2006,
HARVEY OTTOVICH AS TRUSTEE FOR
THE HARVEY G. OTTOVICH REVOCABLE
LIVING TRUST DATED MAY 12, 2006,
MARK OTTOVICH AS SUCCESSOR
TRUSTEE FOR AND BENEFICIARY OF
HARVEY G OTTOVICH REVOCABLE
LIVING TRUST DATED MAY 12, 2006,

Plaintiffs,

v.

WASHINGTON MUTUAL, INC., CHASE
HOME FINANCE, LLC, AND JP MORGAN
CHASE BANK, N.A., AN ACQUIRER OF
CERTAIN ASSETS AND LIABILITIES OF
WASHINGTON MUTUAL BANK FROM
FEDERAL DEPOSIT INSURANCE
CORPORATION ACTING AS RECEIVER,
DOES ONE THROUGH 50, INCLUSIVE,

Defendants.

No. C 10-02842 WHA

**ORDER GRANTING IN
PART AND DENYING IN
PART MOTION TO
DISMISS AND VACATING
HEARING**

INTRODUCTION

This is a motion to dismiss in a foreclosure dispute. Defendants Chase Home Finance, LLC, and JP Morgan Chase Bank, N.A., move to dismiss all *nine* claims asserted against them in

1 plaintiffs' amended complaint.* For the reasons set forth below, defendants' motion to dismiss is
 2 **GRANTED IN PART AND DENIED IN PART.** The hearing on this motion is hereby **VACATED.**

3 **STATEMENT**

4 This civil action involves a mortgage loan secured by California real property located at
 5 303 Laurel Avenue in Hayward (Compl. ¶ 8). Plaintiff Harvey Ottovich alleges defendants
 6 provided him a purchase money loan secured by the property (Compl. ¶ 9). In May 2006 Harvey
 7 Ottovich ceded title to the property to plaintiff Harvey G. Ottovich Living Trust Dated May 12,
 8 2006, with plaintiff Mark Ottovich as the designated successor trustee and beneficiary. Mark
 9 Ottovich was also the attorney-in-fact for his brother Harvey and was in possession of a valid
 10 power of attorney executed by Harvey Ottovich (Compl. ¶ 10).

11 Soon after ceding title Harvey Ottovich became incapacitated and was unable to perform
 12 daily duties required to manage the property (Compl. ¶ 12). In March 2009 Mark Ottovich, on
 13 behalf of his brother and the Trust, began contacting defendants to seek information on how much
 14 money was owed on the loan for the property (Compl. ¶ 13–14). From March 2009 to April 2010
 15 Mark Ottovich made over 25 attempts to contact defendants to clarify the amount owed on the
 16 loan and to make payments to defendants. During this one-year period, plaintiffs' complaint
 17 alleges, defendants refused to provide information to plaintiffs about the amount of money due to
 18 make loan payments current, misrepresented how much money plaintiffs owed defendants, and
 19 accepted payments from plaintiffs for the loan on the property but did not apply these payments to
 20 payment of that loan (Compl. ¶ 14–17). As a result of this behavior, plaintiffs alleged that they
 21 incurred damages in the form of late fees as well as emotional distress (Compl. ¶ 28–30).

22 In April 2010 defendants sent a letter to plaintiffs notifying them of foreclosure on the
 23 property (Compl. ¶ 16). Plaintiffs initiated the instant action in state court and defendants
 24 removed (Dkt. No. 1). Defendants initially brought a motion to dismiss on July 9, 2010 (Dkt. No.
 25 5). Defendants initial motion to dismiss, however, was terminated when plaintiffs filed an
 26 _____

27 * During the case management conference on September 16, 2010, plaintiffs admitted that they had not yet
 28 served notice of this suit to Washington Mutual, Inc. Plaintiffs were instructed to serve Washington
 Mutual, or the FDIC on behalf of Washington Mutual, within thirty days. Washington Mutual did not join
 in this motion to dismiss, evidently not yet being in the case.

1 amended complaint with additional facts (Dkt. No. 11). Defendants filed this motion to dismiss
2 and plaintiffs filed a timely opposition (Dkt. No. 25).

3 ANALYSIS

4 The amended complaint sets forth nine federal and state law claims: (1) breach of
5 contract.; (2) breach of the implied covenant of good faith and fair dealing; (3) violations of the
6 Real Estate Settlement Procedures Act (“RESPA”) under 12 U.S.C. 2605; (4) unfair debt
7 collection under California Civil Code Section 1788 and the Fair Debt Collections Act, 15 U.S.C.
8 1692 *et seq.*; (5) demand for accounting; (6) injunctive relief; (7) declaratory relief; (8) unfair
9 business practices under Section 17200 of the California Business & Professions Code; and
10 (9) intentional infliction of emotional distress. As explained in the analysis below, the motion to
11 dismiss is **GRANTED IN PART AND DENIED IN PART**.

12 1. STANDARD OF REVIEW

13 To survive a motion to dismiss for failure to state a claim, a pleading must contain
14 sufficient factual matter, accepted as true, to state a claim that is plausible on its face. FRCP
15 12(b)(6); *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). A claim is facially plausible when there
16 are sufficient factual allegations to draw a reasonable inference that defendants are liable for the
17 misconduct alleged. While a court “must take all of the factual allegations in the complaint as
18 true,” it is “not bound to accept as true a legal conclusion couched as a factual allegation.” *Id.* at
19 1949-50. “[C]onclusory allegations of law and unwarranted inferences are insufficient to defeat a
20 motion to dismiss for failure to state a claim.” *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140
21 (9th Cir. 1996). Dismissal without leave to amend is only appropriate when the Court is satisfied
22 that the deficiencies in the complaint could not possibly be cured by amendment. *Jackson v.*
23 *Carey*, 353 F.3d 750, 758 (9th Cir. 2003) (citation omitted). With these legal standards set forth,
24 this order turns to the nine claims in the amended complaint.

25 2. STANDING

26 The “irreducible constitutional minimum” of standing contains three elements: (1) the
27 plaintiff must have suffered an “injury in fact” — an invasion of a legally protected interest which
28 is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical;

(2) there must be a causal connection between the injury and the conduct complained of; and (3) it must be “likely,” as opposed to merely “speculative,” that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

Defendants contend that all plaintiffs lack standing, but defendants only make specific arguments as to why plaintiff Mark Ottovich lacks standing. Defendants’ argument fails. Plaintiffs’ amended complaint alleged that all plaintiffs, especially Harvey Ottovich, have a concrete, redressable injury claim connected to the behavior of defendants. The Supreme Court ruled in *Department of Commerce v. United States House of Representatives*, that if any plaintiff has standing, it satisfies the standing requirement for all co-plaintiffs who are proper parties on the same complaint seeking the same relief because the case before the court is justiciable. 525 U.S. 316, 330 (1999). Plaintiffs meet the standing elements set forth in *Lujan*, because plaintiffs’ amended complaint sufficiently alleged that all plaintiffs, including Mark Ottovich, are proper parties seeking the same relief.

Defendants also allege that all claims against defendant Chase Home Finance must be dismissed because they are not redressable. Specifically, defendant Chase asserts that it is a different entity from defendant Washington Mutual and defendant JP Morgan and that it is not responsible for or party to the dealings between those defendants and plaintiffs. Plaintiffs’ amended complaint, however, alleged nine claims against all defendants. Taking the assertions in the amended complaint as true, defendants’ argument for lack of standing on this point also fails.

For these reasons, defendants’ motion to dismiss for lack of standing is **DENIED**.

3. BREACH OF CONTRACT

Plaintiffs’ first claim is for breach of contract. Defendants move to dismiss on the ground that the complaint does not allege sufficient facts. Defendants’ motion to dismiss correctly sets out the standard elements of a claim for breach of contract: “(1) the contract, (2) plaintiff’s performance or excuse for nonperformance, (3) defendant’s breach, and (4) damage to plaintiff therefrom.” *Troyk v. Fanners Group, Inc.*, 171 Cal.App.4th 1305, 1352 (2009).

Plaintiffs alleged sufficient facts in their amended complaint to meet each element for a breach of contract claim. *First*, plaintiffs entered into a contract with defendants for a loan on the

1 property. *Second*, although plaintiffs acknowledge nonperformance on that contract, they also
2 alleged sufficient facts for excuse of that nonperformance. *Third*, the amended complaint alleged
3 numerous instances of defendants' breach of that contract. *Fourth*, plaintiffs also asserted
4 specific details as to damages suffered as a result of defendants' breach of contract with plaintiffs.

5 Defendants also assert that the agent-immunity rule applies and prevents plaintiffs from
6 asserting a successful breach of contract claim. Plaintiffs' amended complaint, however, alleged
7 that defendants were the "agents, employees, and co-conspirators of their co-defendants" and
8 were "acting within the course and scope of the agency, employment and/or conspiracy" (Compl.
9 ¶ 6). Plaintiffs alleged that defendants were acting in the scope of their agency relationship as
10 one possibility, but it was not the only possibility they alleged. Plaintiffs also alleged defendants
11 could have been acting in the scope of their employment. Assuming the latter is true, the agent
12 immunity rule does not apply. Defendants argument fails.

13 Defendants' motion to dismiss plaintiffs' claim for breach of contract is **DENIED**.

14 **4. BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING**

15 Plaintiffs' second claim is for breach of the implied covenant of good faith and fair
16 dealing. To establish this claim, a plaintiff must establish the existence of a contractual obligation,
17 the identities of the parties involved, and conduct that impedes the other party's rights to benefit
18 from the contract. Plaintiffs have sufficiently pled all of these elements in the amended complaint
19 under the breach of contract claim. In addition, defendants do not make specific arguments
20 detailing how plaintiffs failed to establish the elements for this claim. Defendants' motion to
21 dismiss this claim is **DENIED**.

22 **5. RESPA**

23 Plaintiffs' third claim alleged that the defendants violated RESPA by not responding to
24 written requests from plaintiffs. Section 2605 under RESPA governs claims regarding written
25 requests. Section 2605(e)(1) specifically requires servicers of federally related mortgage loans to
26 respond to "qualified written requests" from borrowers seeking information relating to loan
27 servicing. 12 U.S.C. 2605(e)(1). Servicers' failure to provide a response is actionable under
28 Section 2605(f). A number of courts have read Section 2605(f) to require a showing of pecuniary

1 damages. In *Hutchinson v. Delaware Savings Bank FSB*, the court stated that “alleging a breach
2 of RESPA duties alone does not state a claim under RESPA. Plaintiff must, at a minimum, also
3 allege that the breach resulted in actual damages.” 410 F. Supp. 2d 374, 383 (D.N.J. 2006).

4 Here, defendants argue that plaintiffs’ RESPA claim fails because no pecuniary loss is
5 alleged. This order disagrees. Plaintiffs alleged sufficient pecuniary damages resulting from
6 defendants’ alleged non-response to plaintiffs’ written requests. Plaintiffs specifically alleged
7 that they had to pay late fees and other monetary penalties because of defendants’ non-
8 responsiveness.

9 For these reasons, defendants’ motion to dismiss plaintiffs’ RESPA claim is **DENIED**.

10 **6. UNFAIR DEBT COLLECTION**

11 Plaintiffs’ fourth claim, for unfair debt collection, alleged that defendants violated
12 provisions of California’s Rosenthal Fair Debt Collection Practices Act and the Federal Debt
13 Collections Act (Compl. ¶ 52–56). Under these laws, a “debt collector” is any person “who
14 regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be
15 owed or due another.” 15 U.S.C. 1692a(6); *see also* Cal. Civ. Code 1788.2(c). A defendant must
16 be a “debt collector” to be subject to these laws. Additionally, a complaint must allege how the
17 “debt” at issue was an “obligation of . . . a consumer to pay money arising out of a transaction in
18 which the money, property, insurance, or services which are the subject of the transactions are
19 primarily for personal, family or household purposes” as required under these laws. 15 U.S.C.
20 1692a(5); *see also* Cal. Civ. Code 1788.2(b), (e).

21 Plaintiffs’ amended complaint alleged that defendants were debt collectors and that the
22 property was the home of Harvey Ottovich. This satisfies the pleading requirements under the
23 appropriate standard of review. Defendants assert that they are not debt collectors as defined by
24 law. Defendants argue that the collection of debt or foreclosure of the property pursuant to
25 default on a loan does not constitute debt collection. *Hulse v. Ocwen Federal Bank, FSB*, 195 F.
26 Supp. 2d 1188, 1204 (D. Or. 2002). This argument is incomplete. First, *Hulse* has been found to
27 be overly broad in the categorical exclusions it provided under federal law to lenders. *See*
28 *Kaltenbach v. Richards*, 464 F.3d 524, 528–29 (5th Cir. 2006). Second, the behavior of

1 defendants, in the instant case, goes beyond mere foreclosure proceedings, as plaintiffs alleged
2 that defendants repeatedly obfuscated the truth with regard to the loan amounts and payments.

3 Defendants' motion to dismiss plaintiffs' unfair debt collection claim is **DENIED**.

4 **7. ACCOUNTING**

5 Plaintiffs' fifth claim was a demand for accounting. An accounting may take the form of
6 a legal remedy or an equitable claim. A request for a legal accounting must be tethered to
7 relevant actionable claims. To state a claim for accounting the complaint must allege: (1) a
8 relationship or other circumstances appropriate to the remedy; and, (2) a balance due from the
9 defendant to the plaintiff that can only be ascertained by an accounting. *Brea v. McGlashan*, 3
10 Cal.App.2d 454, 460 (1934). Defendants assert they did not enter into a fiduciary relationship
11 with plaintiffs because a lender does not owe a fiduciary duty to a borrower. A fiduciary
12 relationship between the parties, however, is not required to state a cause of action for an
13 accounting. "All that is required is that some relationship exists that requires an accounting."
14 *Teselle v. McLoughlin*, 173 Cal.App.4th 156, 179 (2009). The facts alleged by plaintiffs establish
15 such a relationship and the potential need for an accounting.

16 Defendants' motion to dismiss plaintiffs' claim for accounting is **DENIED**.

17 **8. INJUNCTIVE RELIEF**

18 Plaintiffs' sixth claim is for injunctive relief. "In brief, the bases for injunctive relief are
19 irreparable injury and inadequacy of legal remedies. In each case, a court must balance the
20 competing claims of injury and must consider the effect on each party of the granting or
21 withholding of the requested relief." *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531,
22 542 (1987). The Supreme Court recently clarified that, even where a likelihood of success on the
23 merits is established, a mere "possibility" of irreparable injury will not suffice; rather, irreparable
24 injury must be "likely." *Winter v. Natural Resources Defense Council*, 129 S.Ct. 365, 374–76
25 (2008). Until this case is finally determined, it is impossible to say that injunctive relief will not
26 be in order. Defendants' motion to dismiss plaintiffs' claim for injunctive relief is **DENIED**.

1 **9. DECLARATORY RELIEF**

2 Plaintiffs' seventh claim seeks declaratory relief. Until this case is finally determined, it is
3 impossible to say that declaratory relief will not be in order. Defendants' motion to dismiss
4 plaintiffs' claim for declaratory relief is **DENIED**.

5 **10. UNFAIR BUSINESS PRACTICES**

6 Plaintiffs' eighth claim is for unfair business practices. California unfair competition law
7 covers "any unlawful, unfair, or fraudulent business act or practice." Cal. Bus. & Prof. Code
8 17200 *et seq.* Persons authorized to bring claims under this code section are "those who have
9 suffered injury in fact and lost money or property as a result of the unfair competition." Cal. Bus.
10 & Prof. Code 17204. In addition, "damages" are *not* an available remedy under Section 17200.
11 "A UCL [Section 17200] action is equitable in nature; damages cannot be recovered." *Korea*
12 *Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1144 (2003). A prevailing plaintiff is
13 generally limited to injunctive relief and restitution, meaning monies or property unfairly
14 obtained by defendants in which plaintiff has an ownership interest. *Id.* at 1144, 1148. Plaintiffs
15 allege that defendants engaged in fraudulent, unlawful, and unfair practices within the meaning of
16 the statute by failing and refusing to disclose information about current loans to its customers.

17 **A. Fraudulent Conduct**

18 After Section 17200 was amended in November 2004, plaintiffs must plead that they were
19 injured in fact "as a result" of defendants' fraudulent conduct. This means that plaintiffs must
20 allege that had the omitted information been disclosed, they would have been aware of it and
21 behaved differently. Plaintiffs' amended complaint alleged that defendants made false promises,
22 misappropriated funds, and withheld information. As a result, plaintiffs assert that they were
23 injured because they had to pay additional fees, penalties, and even purchase additional insurance.
24 Plaintiffs, therefore, state a factually sufficient claim for fraudulent conduct under Section 17200.

25 **B. Unlawful Practices**

26 Plaintiffs also allege that defendants engaged in unlawful practices in violation of Section
27 17200. A practice is unlawful if it violates a law other than Section 17200 when committed
28 pursuant to business activity. *See Farmers Insurance Exchange v. Superior Court*, 2 Cal.4th 377,

383 (1992). Plaintiffs' amended complaint alleged that defendants actions were in violation of the RESPA and constituted unlawful conduct under Section 17200. Accordingly, plaintiffs' allegation that defendants violated Section 17200 for unlawful practices is sufficient.

C. Unfair Practices

A business practice constitutes unfair competition "if it offends an established public policy or . . . is immoral, unethical, oppressive, unscrupulous *or* substantially injurious to consumers." *People v. Duz-Mor Diagnostic Laboratory, Inc.*, 68 Cal.App.4th 654, 658 (1998) (internal quotations and citations omitted). While a business practice can constitute unfair competition if it causes consumers to pay higher prices, a business practice can also constitute unfair competition if the practice offends public policy. *Ibid.* Plaintiffs alleged that defendants both caused plaintiffs to pay higher prices, through the misappropriation of funds, and also violated public policy by refusing to serve plaintiffs as loan customers. Plaintiffs adequately pled defendants' conduct was unfair within the meaning of the statute.

Defendants' motion to dismiss plaintiffs' claim for unfair competition is **DENIED** without prejudice to trial or to summary judgment on a more complete record.

11. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Plaintiffs' ninth claim against defendants is for intentional infliction of emotional distress. To state a claim for this tort, a party must allege (1) outrageous conduct, "so extreme as to exceed all bounds of that usually tolerated in a civilized community," (2) an intent to cause or a reckless disregard of the possibility of causing emotional distress, (3) severe or extreme emotional distress, and (4) that the outrageous conduct proximately caused the emotional distress. *Symonds v. Mercury Sav. & Loan Ass'n*, 225 Cal.App.3d 1458, 1468 (1990).

Plaintiffs' amended complaint is insufficient under *Iqbal* and *Twombly*. Plaintiffs' amended complaint lacks specific facts describing the severe emotional distress suffered, let alone that defendants' conduct proximately caused this distress. Plaintiffs merely assert legal conclusions that they suffered severe emotional distress as a result of the conduct of defendants. Furthermore, plaintiffs also failed to allege sufficient facts to establish intent by defendants to

1 inflict emotional distress. Plaintiffs' claim for intentional infliction of emotional distress is
2 **DISMISSED** with leave to amend.

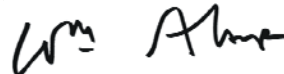
3 **CONCLUSION**

4 For the reasons set forth above, defendants' motion to dismiss all claims asserted in the
5 complaint is **GRANTED IN PART AND DENIED IN PART**. Specifically, defendants' motion to
6 dismiss claim nine is **GRANTED** with leave to amend and **DENIED** as to all other claims. Plaintiffs
7 may seek leave to amend the complaint and will have **FOURTEEN CALENDAR DAYS** from the date
8 of this order to file a motion, noticed on the normal 35-day calendar, for leave to amend the
9 complaint. If no motion is filed by this deadline, the claim will be dismissed.

10
11 The hearing on this motion is hereby **VACATED**.

12
13 **IT IS SO ORDERED.**

14 Dated: September 22, 2010.



15
16 **WILLIAM ALSUP**
17 **UNITED STATES DISTRICT JUDGE**